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NO. 83-3219

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1985

FRANK PALAZZO,

Petitioner,

v.

GULF OIL CORPORATION,
a Pennsylvania Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Herbert T. Schwartz
SCHWARTZ & WILSON
711 N.W. 23rd Avenue, #4
Post Office Box 1292
Gainesville, Florida 32602
(904) 378-2681
Counsel for Petitioner

Effective October 28, 1985, Counsel will be relocated at:

WOOD, LUCKSINGER & EPSTEIN
1221 Lamar, Suite 1400
Houston, Texas 77010
(713) 951-2409

October 23, 1985

120 pp

Question Presented for Review

Whether an individual who directly sustains economic loss as a result of anticompetitive activity, has standing to bring an antitrust suit on behalf of the corporate entity through which he operates his enterprise.

TABLE OF CONTENTS

	PAGE
Table of Contents.....	i,ii,iii
Table of Authorities.....	iv
Jurisdiction.....	1
Statement of the Case.....	1
Procedural History of the Action.....	4
Reasons for Granting of the Writ.....	5
The conflict between the Eleventh Circuit and the Supreme Court	
Conclusion.....	16

Appendix.....

A. Opinion of the United States Court of Appeal for the Eleventh Circuit entered July 5, 1985.

B. Summary Judgment against Frank Palazzo entered January 31, 1983.

C. Petition for Rehearing and Suggestion for a Rehearing En Banc filed September 3, 1985

D. Notice of Order entered by the 11th Circuit, United States Court of Appeals on October 4, 1985, denying petition for rehearing and rehearing en banc.

E. Report and Recommendation of United States Magistrate Thomas G. Wilson, dated November 16, 1982.

F. Order of Dismissal entered by United States District Court, Middle District, on January 31, 1983:

1) Claims of Advanced Sales Corporation in Counts I,II, III and V dismissed;

2) Claims of Tina Palazzo in Counts IV and V dismissed;

3) Summary Judgment on Counts IV and V to be entered in favor of GULF, and against PALAZZO.

Appendix continued.....

C. Letter submitted to The Honorable Judges Roney, Tjoflat and Brown, of the United States Court of Appeals, 11th Circuit, presenting post-argument by counsel for Frank Palazzo.

TABLE OF AUTHORITIES

PAGE

Cases:

National Independent Theatre Exhibitors, Inc. et al vs. Charter Financial Group, etc., 747 F.2d 1396 (11th Cir. 1984)..... 10,11,12

Perkins v. Standard Oil, 395 U.S. 642 (1969)..... 5,6,7,12, 15,16

U.S. v. Topco Associates, 405 U.S. 610 (1972)..... 14

Statutes:

15 U.S.C. § 751..... 1

28 U.S.C. § 1254(1)..... 1

Other Authorities:

53 Tex. Law Rev. 1189-90 (1975). 15

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THE OPINION OF THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT NOT YET REPORTED APPEARS AS APPENDIX A TO THIS PETITION.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on July 5, 1985. A Petition for Rehearing and Suggestion for a Rehearing En Banc was filed on September 3, 1985; that petition was denied and such suggestion rejected by the appellate court on October 4, 1985. This Petition is timely filed pursuant to this Court's rules and 26 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arose out of the energy crisis and gasoline shortage of 1973. The Petitioner was a retailer of motor fuels subject to the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. § 751. His allocation was initially established

at 1,000,000 gallons per year and, after objection filed by his supplier, Gulf, the Petitioner's allocation was reduced to 185,000 gallons per year. As a result of an administrative adjudication, the Petitioner's allocation was adjusted upward to 800,000 gallons per year.

The crux of the problem between the parties to this cause arose from the pricing structure in the supply relationship.

The Petitioner and his wife were the sole shareholders in the retail corporation. They and their corporation filed an action against Gulf alleging, inter alia, violation of the Sherman and Clayton Acts.

The attorney representing the individual and corporate plaintiffs was allowed to withdraw in May 1981. The Petitioner, Frank Palazzo, attempted

to appear for himself, his ex-wife (by virtue of an assignment of interests) and their now defunct corporation.

The case was referred to a United States Magistrate for disposition of pending motions and a factual and legal report and recommendation to the District Judge. Such report and recommendation was issued on November 16, 1982. On January 31, 1983 the district court adopted the Magistrate's report and recommendation and entered an order (1) dismissing the corporation for failure to be represented by an attorney, (2) dismissing the claim of the ex-wife for failure to prosecute and, most important to this petition, entered a summary judgment against Frank Palazzo on his antitrust claims against Gulf.(App. B) The gravamen of the court's rejection of Frank Palazzo's claim was that his

corporation, not him individually, was the "target" of the alleged antitrust violation.

PROCEDURAL HISTORY OF THE ACTION

The cause was submitted to the Magistrate upon the record on March 16, 1982. The Magistrate's report and recommendation was ratified by the district judge on January 31, 1983 and a notice of appeal was filed by Petitioner on March 3, 1983 to the Temporary Emergency Court of Appeals as to Counts I, II, and IV (those arising under the Emergency Petroleum Allocation Act.) On March 18, 1983, Mr. Palazzo filed his notice of appeal on all counts to the United States Court of Appeals for the Eleventh Circuit. The district court's judgment as to Counts I, II, and IV were affirmed by the TECA on

September 9, 1983 and the Eleventh Circuit affirmed, with opinion, on July 5, 1985. The rehearing petition was denied in due course on October 4, 1985.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's opinion is significant by its failure to conform its analysis to the doctrine of this Court previously pronounced and of long-standing in Perkins v. Standard Oil, 395 U.S. 642 (1969).

The opinion of the Eleventh Circuit begins with a premise that Frank Palazzo was only a "remote" victim of Gulf's alleged anticompetitive conduct. Starting from such a premise is only to preordain the inevitable conclusion.

Thus viewed, the Eleventh Circuit's decision and opinion are in direct con-

flict with the time honored teaching of this Court in Perkins. That significant conflict indicates an erroneous application of this Court's authoritative precedent and should be clarified as future guidance among the circuits.

THE CIRCUIT COURTS OF APPEAL ARE IN NEED OF A CLARIFICATION OF THE TARGET (OR STANDING) THEORY ENUNCIATED BY PERKINS V. STANDARD OIL.

The standard of personal standing to state a claim for relief by a dominant corporate personality is neither esoteric in its concept nor oblique in its pronouncement by this Court.

What has taken on almost a life of its own is the so-called "target" theory of antitrust standing. Lower courts, such as in the instant cause, have used such categorizations inductively to reach what appears to be a predetermined result. On the other hand,

this Court in Perkins set a clear standard against which an individual's right to redress is to be measured. That standard was (and remains) as elementary as it is fundamental.

In Perkins, this Court recognized that a small businessman who operates his enterprise through a corporate entity can be no less the victim of an anti-competitive act than if he operated as a sole proprietor under essentially the same conditions. A very brief review of Perkins as it came before this Court is appropriate.

Mr. Perkins owned and lent money to corporations which sold gasoline at both wholesale and retail levels. Perkins' retail service stations were harmed by Standard Oil's price discrimination and Perkins filed suit under the antitrust laws, claiming damages

arising out of the corporate indebtedness to him and out of other "personal" claims. He alleged in part that he purchased gas from defendant Standard Oil, who charged him higher prices than it charged its own dealer, Signal. Signal sold to Western Highway, which in turn sold to Regal stations. Regal competed with Perkins, and could offer lower prices than Perkins' stations as a result of Standard Oil's price discrimination that initially favored Signal.

The Ninth Circuit dismissed all claims on the issue of liability arising out of Standard Oil's favoring Signal, holding that plaintiff's injury was too remote for recovery. Certainly, Perkins was far more removed from Standard's anticompetitive activities than Mr. Palazzo was removed from the acts

of Gulf in the instant cause.

Nonetheless, this Court granted certiorari and reversed the Ninth Circuit. On point with the issues involved in the instant cause, this Court held that Perkins was entitled to submit all of his damages to the jury in whatever capacity they were sustained. Similar to Mr. Palazzo in this case, This Court held that:

> It is clear in this case...that Perkins was victim of the price discrimination practiced by Standard. Since he was directly injured and was clearly entitled to bring this suit, he was entitled to present evidence of all of his losses to the jury.

Id. at 649-650. (emphasis added).

The context within which this holding was rendered emphasizes its importance: This Court raised the issue of standing sua sponte, certiorari having been accepted only to consider the

Ninth Circuit's interpretation of the Robinson-Patman Act. This Court held that Perkins had standing to complain of Standard Oil's price discrimination in favor of Signal. Perkins was the principal victim, the apparent object and target of Standard's anticompetitive activities:

> We find no basis in the language or purpose of the act for immunizing Standard's price discrimination simply because the product in question passed through an additional formal exchange before reaching the level of Perkins' actual competitor. From Perkins' point of view, the competitive harm done him by Standard is certainly no less because of the presence of an additional link in the chain from the producer to the retailer.

Id. at 649.

By its decision and opinion in the instant cause, relying as it does on National Independent Theatre Exhibitors, Inc., et al vs. Charter Financial Group, etc., 747 F.2d 1396 (11th Cir. 1984),

the Eleventh Circuit has painted all persons in the shoes of this Petitioner with a very broad brush. Without the travail of close factual analysis of each case, the Eleventh Circuit begins with the erroneous presumption that any claimant such as Mr. Palazzo is too remote because he operates through a small business corporation.

In National Indep. Theatre, the factual variants vis-a-vis the instant cause are so distinct as to be not only different in degree but different in kind as well.

To the extent that the Eleventh Circuit has simply grouped such claimants as Mr. Palazzo in the same pot with any corporate shareholder, no matter how factually remote, that Honorable Court is in error and has created a direct and clear conflict with this

Court's teachings in Perkins.

The affirmation of the district court's summary judgment has denied a trier of fact the opportunity to determine the directness or remoteness of Mr. Palazzo to Gulf's alleged predatory conduct.

As this counsel respectfully suggested to the Eleventh Circuit in the post-oral argument letter which was invited by the panel, blindly applying the doctrine of National Indep. Theatre inductively to the instant cause is to stand on its theoretical head the commandment of this Court in Perkins.

This Court should not permit such an anomalous treatment of this Court's clearly enunciated doctrine to remain uncorrected. To do so will only result in further deviation from this Court's authoritative role in setting precedent

and further conflict among the several circuits and district courts in their efforts to use Supreme Court pronounced doctrines as tools of predictability and finality.

The type of economic litigation sought to be presented to a trier of fact is precisely that which has the opportunity to achieve the social goals implicit in the antitrust laws as pronounced by this Court:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed to each and every business, no matter how small, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might

> promote greater competition in a more important sector of the economy.

U.S. v. Topco Associates, 405 U.S. 610 (1972). (emphasis added).

The lesson of Topco is especially relevant to the instant cause since it is clear and uncontradicted that Mr. Palazzo was the sole owner and operator of the retail service station which became the target of Gulf's predatory conduct. As such, Mr. Palazzo represents the very focus of that national goal; he is the quintessential part of our economic system. The small businessman has historically been singled out by the antitrust laws for protection from becoming the economic prey of larger, wealthier business entities:

> Most commentators now concede that the promotion of competition embraces not only economic goals, but social ones as well. Expressions of these social concerns appear in both the legislative history of the Sherman Act and

> in subsequent judicial interpretations. In the congressional debates, the Sherman Act was urged as a means of dealing with great trusts that had accumulated tremendous power threatening small businessmen, the consuming public, and the social order. Its purpose was variously conceived to be to preserve "free and full competition," to protect the public against high prices, and to protect small business and individual freedom against corporate wealth and power. In the broad, general terms of the debates, the Senators appeared to regard these social, political and economic purposes as consistent, collateral thrusts of the Act.

53 Tex. L. Rev. 1189-90 (1975).

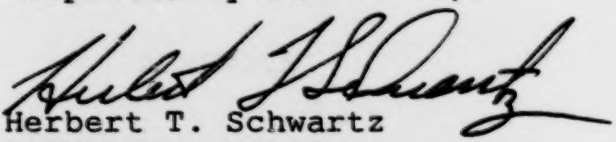
The fact that he used a corporate form to operate his service station facility is a thin reed for the Eleventh Circuit to grasp. It obscures the reality and worships the illusion.

In sum, it does violence to the real and viable social and economic policy for which the antitrust laws were created and which were unambiguously recognized by this Court in Perkins.

CONCLUSION

For the reasons stated herein and upon the authoritative doctrine of Perkins, it is respectfully submitted that the conflict created in this cause by the Eleventh Circuit is worthy of consideration by this Court.

Respectfully submitted,



Herbert T. Schwartz
SCHWARTZ & WILSON
711 N.W. 23rd Avenue, #4
Post Office Box 1292
Gainesville, Florida 32602
(904) 378-2681
Counsel for Petitioner

Effective October 28, 1985, Counsel will be relocated at:

WOOD, LUCKSINGER & EPSTEIN
1221 Lamar, Suite 1400
Houston, Texas 77010
(713) 951-2409

APPENDIX

Frank PALAZZO, Plaintiff-Appellant,

v.

GULF OIL CORPORATION, a Pennsylvania Corporation,
Defendant-Appellee.

No. 83-3219

United States Court of Appeals,
Eleventh Circuit.

July 5, 1985.

Officer of gas retailing corporation brought anti-trust action against oil company on behalf of himself, a fellow officer, and the corporation. The United States District Court for the Middle District of Florida, William J. Castagna, J., entered summary judgment in favor of oil company, and officer appealed. The Court of Appeals, John R. Brown, Senior Circuit Judge, held that: (1) corporation was required to be represented by licensed counsel, and officer could not raise claims of

corporation in his pro se capacity; (2) corporate officers had no standing to bring antitrust action in their individual capacities; and (3) oil company did not violate antitrust laws by charging dealer tank wagon price for gasoline or submitting statements to Federal Energy Agency challenging retailer's request for base period allocation.

AFFIRMED.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY, and TJOFLAT, Circuit Judges, and BROWN*, Senior Circuit Judge.

* Honorable John R. Brown, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

JOHN R. BROWN, Senior Circuit Judge:

This case involves the antitrust claims of three parties: Frank Palazzo, Tina Palazzo, and Advanced Sales Corp. (Advanced). Plaintiffs Frank Palazzo and Tina Palazzo co-owned business property leased to Advanced, and were president and vice-president, respectfully, of Advanced when this suit was filed. Plaintiff Advanced is an independent, non-branded wholesale purchaser and retailer of gasoline.

In this appeal, Frank Palazzo, a layman proceeding pro se, seeks to assert the claims of both Advanced and Tina. He also asks us to recognize his right to recover damages in his individual capacity for anti-competitive activity allegedly directed at Advanced's business. After reviewing the record we conclude first that, due to the general rule requiring corporations to be

represented by counsel, Frank may not represent the corporation in his pro se capacity. Second, we decide that the individual claims of Frank and Tina are not the type for which recovery is available under the applicable anti-trust laws. We thus affirm the district court's Order of Dismissal and Entry of Summary Judgment.

Background

In 1973, because of a shortage of gasoline, Congress enacted the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. § 751, et seq. which regulated the sale of gasoline by refiners, such as defendant, Gulf Oil Corp. Regulations promulgated under the EPAA were designed to ensure that all customers of gasoline suppliers received a monthly volume of gasoline proportionate to the amounts they had received in 1972, before any shortages occurred.

As a relatively new retailer of gasoline, Advanced, which began operations in 1974 had no 1972 supplier. Thus, under applicable regulations, on March 7, 1974, the regional administrator of the Federal Energy Agency (FEA) designated defendant Gulf as the supplier for Advanced, with an initial base period volume of 1 million gallons per year. In April of 1974, apparently after objections filed with the FEA by Gulf and competitors of Advanced, this base period volume was reduced to 185,000 gallons per year. In August of 1974, however, this reduction order was stayed. In January, 1975, Advanced's supply volume was finally adjusted to 800,000 gallons per year.

Gulf proceeded to supply Advanced with gas as required by the FEA. Advanced, however, objected strenuously

to the price at which the gas was supplied. Gulf charged Advanced the same dealer tank wagon price for gasoline as it charged its branded, Gulf retail dealers. Advanced argued that as a non-branded, independent retailer, it should receive a lower price for its gasoline, since it did not enjoy the benefits, such as credit cards and name-brand products, available to branded dealers. Gulf responded that the price being charged was appropriate under the applicable regulations, and that the regulations in fact prohibited Gulf from establishing a different price for Advanced than it had for other dealers in the aea.

Over the next two years, Advanced repeatedly objected to the price at which Gulf supplied its gasoline. During this time, Advanced purchased some of

its gasoline from Gulf, but also made recurrent purchases from other wholesalers on the "spot market." Unable to resolve its pricing problems with Gulf, Advanced requested a change of supplier. The FEA granted this request and on May 6, 1977, Gulf was relieved of its supply obligation to Advanced.

In December of 1977, Advanced made a written demand to Gulf for refund of the overcharges alleged to have resulted from Gulf's pricing policies. Gulf refused any refund and in March of 1978, the three plaintiffs, Frank Palazzo, Tina Palazzo and Advanced, filed their complaint against defendant. The complaint, as amended in July of 1978, included five counts, and alleged violations of the EPAA, the Economic Stabilization Act of 1970, the Sherman Act, the Clayton Act and the Robinson-

Patman Act, and Florida state antitrust laws. The various counts sought recovery for damages to Advanced, as well as asserting claims on behalf of Frank and Tina individually.

A trial date was initially set for January of 1981. However, such a quick disposition was not to be in this case. In late 1980, the three plaintiffs moved for a continuance of trial in order that pending motions could be resolved. In February of 1981, trial was rescheduled for the first week of February 1982.

In April of 1981, the attorney representing Frank, Tina and Advanced moved for leave to withdraw as attorney of record on grounds that his retainer agreement only contemplated representation through the preliminary stages of the lawsuit, and that the intervening

divorce of Frank and Tina had created a conflict of interest between them.

Without objection from defendants, the district court, on May 12, 1981, granted the motion, stating: "The plaintiffs shall have thirty (30) days...to secure substitute counsel (or the individual plaintiffs may file and serve a notice of proceeding pro se)..." Thirty-one days later, Frank Palazzo filed a "Notice of Pro Se Appearance," and moved for permission to appear as "Counsel Pro Se for the Plaintiffs."

Discovery proceeded, and on December 22, 1981, defendant Gulf moved for summary judgment as to all counts. On March 16, 1982, the case was referred to a United States Magistrate for disposition of all pending motions, and for his report and recommendation. On March 29, 1982, the magistrate al-

lowed plaintiffs 10 days to respond to defendant's motion for summary judgment. He also ruled that the court would not entertain any submissions on behalf of the corporate plaintiff Advanced except those by a licensed attorney. Nevertheless, on April 13, more than 10 days later, plaintiff Frank Palazzo responded on behalf of all plaintiffs, and also filed a "Motion to Recognize Frank Palazzo as Plaintiff in all Counts and Proceed Pro Se." In that motion, Frank stated that Tina's claims had been assigned to him by virtue of a propeprty settlement agreement, and that, as the largest creditor and stockholder of Advanced, he was entitled to represent its claims as well.

On November 16, 1982, the magistrate issued his Report and Recommendation, in which he recommended (1) that the

claims of Advanced in Counts I,II,III, and V be dismissed for failure to comply with Local Rule 2.03 requiring corporations to be represented by counsel; (2) that Tina Palazzo be dismissed as a party for failure to prosecute; and (3) that summary judgment be entered against Frank Palazzo in favor of Gulf on his claims in Counts IV and V.

On December 28, 1982, Frank Palazzo filed objections to the findings of the magistrate, and attached an affidavit stating that Advanced, the corporation, had transferred its claims to him and that he was therefore entitled to represent the corporate claims pro se. On January 31, 1983, however, the district court adopted the magistrate's recommendations, and entered the Order of Dismissal and Final Judgment from which this appeal has been taken.

On February 22, 1983, Frank Palazzo moved, pursuant to F.R.A.P. 4(a)(5), for an extension of time on behalf of all plaintiffs to appeal the district court's order. On February 24, 1983, the judge granted Frank Palazzo alone until March 18, 1983, to file a notice of appeal. The judge also stated, as to the other plaintiffs, "the plaintiff, Frank Palazzo, may not represent anyone other than himself." Notwithstanding this order, on March 3, 1983, Frank Palazzo, pro se, filed a notice of appeal on behalf of Advanced and Tina, as well as himself, to the Temporary Emergency Court of Appeals (TECA) from the district court's judgment on Counts I,II and IV, containing plaintiff's claims under the EPAA.[1] On March 18, 1983, he appealed the same judgment as to all counts to this court.

On September 9, 1983, TECA affirmed the district court's judgment as to Counts I,II and IV. As to the claims of Advanced in Counts I and II, and Tina in Count IV, the TECA agreed with the district court that their dismissal was proper. The court stated that, even assuming Frank could otherwise properly assert these claims, he had failed to do so within the 30 day limit set by the lower court in its order of May 12, 1981. The court also found no basis for Frank Palazzo's individual claims (in Count IV) for violations of the EPAA and the Economic Stabilization Act. The court observed that there was no support for the proposition that Frank, by virtue of his positions as officer, stockholder and creditor of Advanced, was entitled to recover in his individual capacity for alleged overcharges to the corporation.

On April 9, 1984, this court entered orders (1) dismissing the appeals of Tina Palazzo and Advanced for failure to timely file appellate briefs; (2) dismissing all claims of Frank Palazzo arising out of Counts I, II and IV (the claims based on the EPAA); and (3) granting Frank Palazzo leave to file a supplemental brief as to his right to prosecute the claims arising out of Counts III and V. Count III asserts a claim by Advanced for damages arising from alleged violations of the United States antitrust laws. Count V seeks recovery on behalf of Frank, Tina and Advanced for alleged violations of the Florida antitrust laws.

Frank Palazzo, proceeding pro se has raised numerous issues on appeal. In our view, however, the only important questions concern whether Frank may proceed pro se on behalf of the other named

plaintiffs, and whether his individual claims in this action have any appealable merit. We discuss these questions as they relate to the remaining counts of the complaint.[2]

Count III

Despite being repeatedly admonished to secure counsel to pursue the corporate claims in Count III of the complaint plaintiff Frank Palazzo has continued in his efforts to represent the corporation pro se. He maintains that, by virtue of the corporation's assignment of its claims to him individually, he may assert these corporate claims without the benefit of counsel. We disagree.

The rule is well established that a corporation is an artificial entity that can act only through agents, cannot appear pro se, and must be represented by counsel. Commercial and Railroad Bank

of Vicksburg v. Slocomb, 39 U.S. (14 Pet.) 60, 10 L.Ed. 354 (1840); In re K.M.A., Inc., 652 F.2d 398 (5th Cir. Unit B 1981); Southwest Exp.Co. v. I.C.C., 670 F.2d 53 (5th Cir. 1982). The Southwest court cited a leading case discussing the practical and historical bases for the rule. Thus, in Turner v. American Bar Assn., 407 F.Supp. 451, 476 (N.D.Ind. 1975), aff'd. sub nom. Taylor v. Montgomery, 539 F.2d 715 (7th Cir. 1976), the court observed, in discussing 28 U.S.C. § 1654 (permitting individuals to proceed pro se in federal courts);

Corporations and partnerships, both of which are fictional legal persons, obviously cannot appear for themselves personally. With regard to these two types of business associations, the long standing and consistent court interpretation of § 1654 is that they must be rep-

resented by licensed counsel. In S.Stern & Company v. United States, 331 F.2d 310, 51 C.C.P.A. 15 (1963), the Court of Customs and Patent Appeals held that 28 U.S.C.A. § 1654 would not allow a lay partner in a partnership to represent the partnership in a judicial proceeding. Likewise, there is a long line of cases starting with Osborn v. Bank of United States, 9 Wheat. (22 U.S. 738), 6 L.Ed. 204, and continuing through Commercial & Railroad Bank of Vicksburg v. Slocomb, 14 Pet. (39 U.S. 60), 10 L.Ed. 354 (1840); Nightingale v. Oregon Central Railway Company, 18 Fed.Cas. No. 10,264, p. 239; Brandstein v. White Lamps, 20 F.Supp. 369 (S.D.N.Y., 1937); MacNeil v. Hearst Corp., 160 F.Supp. 157 (Del., 1958); and Flora Construction Company v. Fireman's Fund Insurance Company, 307 F.2d 413 (C.A. 10, 1962), which have held that

under 28 U.S.C.A. § 1654 and its predecessor statutes a corporation may only be represented by licensed counsel. Several of these cases, particularly Nightingale, Hearst and White Lamps, have emphasized the importance of the Centuries-old concept of a Court having a lawyer before it who has been qualified to practice, and who is subject to the Court's control.... Corporations and partnerships, by their very nature, are unable to represent themselves and the consistent interpretation of § 1654 is that the only proper representative of a corporation or a partnership is a licensed attorney, not an unlicensed layman regardless of how close his association with the partnership or corporation.

The general rule that applies even where the person seeking to represent the corporation is its president and major stockholder. In re Las Colinas

Development Corp., 585 F.2d 7 (1st Cir. 1978), cert. denied, 440 U.S. 931, 99 S.Ct. 1268, 59 L.Ed.2d 487 (1979). Nevertheless, plaintiff Frank Palazzo argues that the corporation's assignment of its claims to him operates to avoid this long standing policy.

In National Independent Theater Distributors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602 (11th Cir. 1984), we rejected a similar argument by a corporate shareholder seeking to represent his corporation pro se. There, the plaintiff dissolved the corporation, and moved to substitute himself as the party plaintiff in place of the corporation. In upholding the district court's denial of the motion, we relied on the rule requiring corporate representation by counsel, and recognized the disruptive effect that lay representation can have

on the litigation process. Id. at 609-10.

Moreover, in a situation identical to the one at bar, an individual's attempt to represent corporate claims pro se was considered and rejected by our sister circuit in Jones v. Niagara Frontier Transp. Auth., 722 F.2d 20 (2d Cir. 1983). There, a corporation had assigned its legal claims to its chief executive officer and sole shareholder. In rejecting the officer's attempt to proceed pro se on the corporate claims, the court stressed that the federal courts have disapproved "any circumvention of the rule [of corporate representation by counsel] by the procedural device of an assignment of the corporation's claims to the lay individual." Id. at 23, citing Heiskell v. Mozie, 82 F.2d 861 (D.C. Cir. 1936) and Mercu-Ray Indus-

tries, Inc. v. Bristol-Myers Co., 392 F.Supp. 16 (S.D.N.Y.1974), aff'd. mem., 508 F.2d 837 (2d Cir. 1974).

We see no reason to permit any evasion of the general rule by the simple expedient of the assignment of corporate claims to the pro se plaintiff. Nor is any injustice done to plaintiff by this holding. The record is clear that the court below was more than accommodating in urging proper representation of the corporate claims. When original counsel for the plaintiffs withdrew, the court ordered plaintiffs to secure substitute counsel within 30 days. Despite plaintiffs' failure in this regard, the U.S. Magistrate, over 10 months later, in March of 1982, allowed the corporation another 10 days to obtain counsel for response to defendant's motion for summary judgment. Plaintiffs having been

fully advised of the need for proper representation of the corporate claims, we agree with the lower court's dismissal of these claims for lack of proper representation.

Count V

Count V alleges a conspiracy to restrict the sale of and increase the price of gasoline in the state of Florida, in violation of the Florida Antitrust Act, F.S. § 542.01 et seq.[3] The count seeks to recover for damages to Advanced, as well as for damages allegedly accruing to Tina and Frank Palazzo in their individual capacities. As just discussed, Frank may not assert the corporate claims in a pro se capacity. However, Frank also argues that he has succeeded to Tina's claims by virtue of her assignment of those claims to him.[4] The lower court found that Frank had failed to timely

assert his right to proceed with Tina's claims. We need not, however, decide whether Frank, in his pro se capacity, is entitled to represent Tina's claims as the transferee of those claims, for even assuming that he is, these individual claims must fail for lack of standing.

Although the Florida courts have apparently not decided the precise question presented here, they have observed that the Florida act is patterned after the Sherman Anti-Trust Act, Point East One Condominium, Inc. v. Point East Developers, Inc., 348 So.2d 32, 38 (Fla.Dist.Ct. App. 3rd 1977) (Hubbard, J., concurring and dissenting in part), and that great weight is to be given to federal construction of federal laws in construing the state act. See, e.g., Sabates v. Int'l Medical Centers, Inc., 450 So.2d 514, 517 (Fla.Dist.Ct.App. 3rd 1984)

(construing Florida Antitrust Act of 1980); Hackett v. Metropolitan General Hospital, Inc., 422 So.2d 986, 988 (Fla. Dist.Ct. App.2d 1982) (Same). As a sort of reverse of Erie we thus review federal authority on the subject, as we believe the Florida state courts would do if faced with the same question. Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S.Ct. 1776, 1783, 18 L.Ed.2d 886 (1967).[5]

This circuit has recently addressed the question of the standing of individuals to prosecute antitrust claims. In National Independent Theater Exhibiters v. Bueno Vista Distribution Co., 748 F.2d 602 (11th Cir.1984), we rejected the claims of a corporate officer seeking to recover damages in his individual capacity for alleged violations of the federal antitrust laws:

Standing to prosecute a private antitrust action under section 4 of the Clayton Act requires the plaintiff to prove that "he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry." Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975). See Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752, 762 (11th Cir. 1983). The plaintiff must be the target against which anticompetitive activity is directed. Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 710 (11th Cir. 1984); Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546-47 (5th Cir. 1980), cert. denied, 454 U.S. 927, 102 S.Ct. 427,

70 L.Ed.2d 236 (1981). The injury must be "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). "Incidental or consequential injury or injury remotely caused by an antitrust violation does not give a plaintiff standing to complain that he has been injured by reason of anything forbidden in the antitrust laws." Midwestern Waffles, 734 F.2d at 710-11. See Jeffrey, 518 F.2d at 1131 (citing cases).

Id. at 608. See also Stevens v. Lowder, 643 F.2d 1078 (5th Cir. Unit B 1981); Jones v. Ford Motor Co., 599 F.2d 394 (10th Cir. 1979).

This prudential limitation on standing is intended to forestall the multitude of claims for incidental or consequential injuries which theoretically could be traced to the "ripple effect" of anti-competitive activity. The Supreme Court has also acknowledged the important role which this limitation plays in antitrust actions generally. Associated General Contractors v. Carpenters, 459 U.S. 519, 535-537, 103 S.Ct. 897, 907-08, 74 L.Ed. 2d 723 (1983).[6]

In the present case, the individual claims of Frank and Tina[7] are clearly the type which this and other courts have consistently rejected in antitrust actions. Claims for loss of income and loss of profits resulting from injury to a business are simply too remote to be cognizable claims under the antitrust laws. Moreover, a review of the com-

plaint and the record indicates that any anti-competitive activity was aimed at Advanced as a retailer of gasoline, and not at Frank and Tina individually. The pleadings, broadly and loosely read, allege a conspiracy designed to restrict the supply of gasoline to Advanced. And while injury is claimed to have occurred to Frank and Tina as a result thereof, the record fails to raise any inference that the alleged illegal activity was directed at them in their individual capacities. Thus, the individual plaintiffs were not the target of any anti-competitive activity. Nat'l Ind. Theatre, 748 F.2d at 609-10.

We are also reassured that the decision we reach does not "leave a significant antitrust violation undetected or unremedied." Associated General Contractors, 459 U.S. at 542, 103 S.Ct. at

911. Count V asserts a conspiracy to increase the price and restrict competition in the sale of motor gasoline in Florida. However, in the seven years since this action was initiated, plaintiff has failed to adduce any evidence tending to indicate illegal activities on the part of defendant Gulf or others. The only allegedly conspiratorial acts of Gulf are that it charged plaintiff Advanced the dealer tank wagon price for its gasoline, and that it submitted statements to the FEA challenging Advanced's request for a base period allocation. These statements, along with similar statements submitted by competitors of Advanced, are asserted to constitute a conspiracy in restraint of trade.

As plaintiff Frank Palazzo acknowledged at his deposition, however, these submissions to the FEA were part of the

public record, and were made as part of the established procedure at the time for objecting to requests for allocations. 10 C.F.R. 205.23 (1977). Cf. United Mine Workers v. Pennington, 381 U.S. 657,. 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) (no Sherman Act liability for concerted efforts to influence public officials, regardless of intent or purpose). More important, defendant Gulf has come forward with factually specific affidavits from several officers denying any illegal conspiracy or agreement to restrict Advanced's gasoline allocation, or to increase the price of gasoline to Advanced. In the face of such sworn denials, "it is incumbent upon the plaintiff to produce significant probative evidence demonstrating that a genuine issue of fact exists...." Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 554 (5th Cir.

1980), cert. denied, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981). Plaintiff has not pointed to any such evidence, and we have found it in neither the 800-plus page record, nor in the 500 pages of depositions taken so far in this case. Thus, even assuming plaintiff's standing to prosecute the individual claims, his case could not withstand a motion for summary judgment.

Conclusion

As the U.S. Magistrate observed in his recommendation to the district court, "this case involves gasoline, not wine, and, thus, there is no reason to think that it will improve with age." Report and Recommendation at 8-9. For the reasons set forth, the action of the district court is affirmed, and the stands case dismissed as to all parties and all counts.

AFFIRMED.

FOOTNOTES:

1. TECA was given jurisdiction of appeals from the district courts in cases arising under the EPAA by virtue of § 5(a)(1) of the EPAA, as amended, 15 U.S.C.A. § 754(a)(1) (West 1976) incorporating § 211(b)(2). Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 note (West 1980). See infra note 2.

2. In a motion to this court which has been carried with the case, plaintiff Frank Palazzo has requested an order addressing any possible jurisdictional conflict between this court and TECA regarding the disposition of the various counts in the complaint. As discussed, supra, Counts I, II and IV, raising issues under the EPAA, were appealed to and dismissed by TECA, leaving for decision Counts III and V, which are before us today.

The issues on appeal have been properly divided between the TECA and this court. TECA was granted jurisdiction of appeals from the district courts in cases arising under the EPAA or under regulations or orders issued thereunder. See supra n. 1. The TECA has expressly disclaimed jurisdiction over non-EPAA claims in cases where the complaint contains at least one EPAA claim. Spinetti v. Atlantic Richfield Co., 522 F.2d 1401 (Temp.Emer.Ct.App.1975). The circuit courts have also recognized that TECA's limited jurisdiction has resulted in a system of bifurcated appeals when EPAA

and non-EPAA claims are involved in the same action. See, e.g., United States v. Wyatt, 680 F.2d 1080 (5th Cir.1982). The disposition of the various issues by TECA and this court will not serve to frustrate "the uniform interpretation of the allocation scheme... [nor] serve to undermine the prompt resolution of [EPAA] questions." McWhirter Dist. Co. v. Texaco, Inc., 668 F.2d 511, 526 n. 23 citing Bray v. United States, 423 U.S. 73, 75, 96 S.Ct. 307, 309, 46 L.Ed.2d 215 (1975). Plaintiff's motion is therefore denied.

3. That statute, as it existed at the time this action was filed, made the following activity illegal:

> "(1) Any person who shall or may become engaged in any combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons or of either two or more of them, for either, any or all of the following purposes:
> (a) To create or carry out restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state;
> (b) To increase or reduce the price of merchandise, produce or commodities;
> (c) To prevent competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce;

(d) To fix at any standard or figure whereby its price to the public shall be in any manner controlled or established any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state; ...."

F.S. § 542.05(1975). This statute was repealed by the Florida Antitrust Act of 1980, which substantially revised the Florida antitrust law. 1980 Fla.Laws C. 80-28 § 3. This revision does not affect the disposition of this case, however.

4. In a property settlement agreement pursuant to the divorce of Tina and Frank Palazzo, Tina transferred to Frank all of her interest in, and any claims arising from her interest in Advanced Sales Corporation.

5. As stated, supra, note 3, the Florida Antitrust laws were substantially revised in 1980. As part of this revision, federal antitrust jurisprudence was expressly made persuasive authority for the interpretation of the state antitrust laws. F.S. § 542.32 (1984). Even before this express provision was made a part of Florida law, however, the state courts recognized the similarities between the state and federal provisions. We therefore believe our course here is the correct one.

6. See generally Note, Employee Standing Under § 4 of the Clayton Act, 81 Mich.L. Rev. 1846 (1983).

7. As set out in the complaint:

G) Plaintiffs FRANK PALAZZO and TINA PALAZZO have suffered and are continuing to suffer damages through, inter alia:

1.) Threat of loss of the property leased to ADVANCED by foreclosure proceedings which were stayed only because ADVANCED sought relief under Chapter XI of the Bankruptcy Act.

2.) Destruction of personal credit standing and personal business goodwill.

3.) Increased mental and physical stress brought on by the pressures of working long hours to protect the source of their livelihood.

4.) Loss of the ability to lead a normal social life because of reduced family income and the long working hours required in the struggle to protect their livelihood threatened by the violations by GULF.

5.) Loss of the ability to lead a normal family a normal family life because of reduced family income and the long working hours required in the struggle to protect their livelihood threatened by the violations by GULF.

H) As a direct result of the violations by GULF of Florida law, Plaintiff FRANK PALAZZO has suffered the following damages:

1.) Loss of the ability to carry on the business of American Janitorial and Building Maintenance Services, Inc.

2.) Loss of income from the inability to carry on the business of American Janitorial and Building

Maintenance Services, Inc.

3.) Reduced pay from ADVANCED because of a required increase in working hours at no increase in salary.

4.) Reduction in actual salary paid by ADVANCED because of impaired ability of ADVANCED to pay.

The amount of all said damages are unknown at present, and Plaintiff prays leave to amend this Complaint by inserting the true amounts when known.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ADVANCED SALES CORPORATION
d/b/a DAYTONA PIT STOP,
FRANK PALAZZO and TINA PALAZZO,

Plaintiffs,

vs. Case No. 78-219-Civ-T-WC

GULF OIL CORPORATION, etc.,

Defendant.

FINAL JUDGMENT

For the reasons set out in the Order of Dismissal filed this date, it is,

ADJUDGED:

1. Final Summary Judgment is entered in favor of the Defendant, Gulf Oil Corporation, a Pennsylvania corporation, and against Plaintiff, Frank Palazzo, and Plaintiff, Frank Palazzo, shall take nothing by this action.

2. Defendant, Gulf Oil Corporation, to recover its costs.

DATED at Tampa, Florida this 31st day of January, 1983.

/S/

WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-3219

FRANK PALAZZO,

Plaintiff-Appellant,

versus

GULF OIL CORPORATION,
A Pennsylvania corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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PETITION FOR REHEARING AND SUGGESTION FOR A REHEARING EN BANC

Pursuant to Rule 35(c), Rules of Appellate Procedure, the appellant, through counsel, moves the Court to enter its Order setting a rehearing in this case en banc. Appellant suggests to the Court that the legal authority cited below were not properly considered by the Court in reaching

and publishing the decision and opinion in this cause.

It is most respectfully suggested that a rehearing in this cause should be ordered before the Court en banc in order to allow the entire court to resolve the legal issue of standing vel non of Mr. Palazzo.

ARGUMENT AND CITATION TO AUTHORITY IN SUPPORT OF PETITION FOR REHEARING

At the oral argument of this cause the Court invited counsel to submit supplemental authority and argument to distinguish Mr. Palazzo's standing from that discussed in National Independent Theatre Exhibitors, Inc. v. Charter Financial Group, 747 F.2d 1396 (11th Cir., 1984). The undersigned, as Mr. Palazzo's counsel for oral argument only, complied with the Court's invitation with a letter dated January 10, 1985.

Notwithstanding the analysis of that supplemental written argument clearly distinguishing the initial remoteness of the corporate principal in National Independent Theatre to any recognized theory of standing vis-a-vis the intimacy of Mr. Palazzo to his asserted claims, the Court failed to deal with that critical issue in its opinion.

To begin with the conclusion that Mr. palazzo could not have been in the "target" area of Gulf's conduct is only to foreordain the result. Absent an analysis of the relevant factors virtually compelling the view that Mr. Palazzo was the only target is tantamount to mandating the initial conclusion expressed by the Court regarding standing. As such, the Court only superficially dealt with the reality disclosed by

the record. Such inductive reasoning is an inappropriate method of analysis in which the Court should engage.

Whether Mr. Palazzo was within the so-called target area of Gulf's conduct is a complex factual question. It is most respectfully suggested that the Court's acceptance of the initial conclusion relating to Mr. Palazzo's proximity to standing is unwarranted in light of the authority provided by Perkins v. Standard Oil, 395 U.S. 642 (1969); Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3rd Cir. 1977) and the other caselaw and law review authorities cited to the Court in the post-argument letter of January 10, 1985.

It is respectfully urged upon the Court that the facts of Mr. Palazzo's standing vel non should be weighed on a scale between this Court's analysis

in National Independent Theatre and Perkins and Bogosian. The Court's opinion makes such an evaluation impossible because it accepts at the outset that Mr. Palazzo was not the target:

> "The pleadings, broadly and loosely read, allege a conspiracy designed to restrict the supply of gasoline to Advanced. And while injury is claimed to have occurred to Frank and Tina as a result thereof, the record fails to raise any inference that the alleged illegal activity was directed at them in their individual capacities. Thus, the individual plaintiffs were not the target of any anticompetitive activity. Citing: National Independent Theatre Distributors, Inc. v. Buena Vista Dist. Co., 748 F.2d 602 (11th Cir. 1984) at 609-10).

It is precisely that acceptance without analysis which makes the instant cause appropriate for a rehearing en banc.

Respectfully submitted,

/S/

Herbert T. Schwartz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Petition for Rehearing and Suggestion for a Rehearing En Banc was transmitted to the Clerk of the Court, United States Court of Appeals, Eleventh Circuit, by Federal Express "ZAP" mail, and a copy was furnished to Keith E. Rounsaville, Esquire, TRENAM, SIMMONS, KEMKER & SCHARF, 2600 First Florida Tower, Post Office Box 1102, Tampa, Florida 33601, by regular United States Mail, this 3rd day of September, 1985.

Herbert T. Schwartz

SCHWARTZ & WILSON
711 NW 23rd Avenue
Suite #4
P. O. Box 1292
Gainesville, FL 32602
(904) 378-2681
Counsel for Plaintiff-
Appellant

UNITED STATES COURT OF APPEALS

October 4, 1985

TO ALL PARTIES BELOW:
Frank Palazzo
✓Herbert Schwartz
Keith E. Rounsaville
Harry Kemker

NO. 83-3219 - PALAZZO v. GULF OIL CORP.

This is to advise that an order has this day been entered denying the petition( ) for rehearing.

( ) The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure: Circuit Rule 26), the petition( ) for rehearing en banc has

D

also been denied.

(X) No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 26), the petition() for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

SPENCER D. MERCER, Clerk

/S/ By MH for Brenda Hauck

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ADVANCED SALES CORPORATION, et al.,

Plaintiffs,

v. CASE NO. 78-219-CIV-T-WC

GULF OIL CORPORATION,

Defendant.
_____/

REPORT AND RECOMMENDATION

This cause came on for consideration upon defendant Gulf Oil Corporation's Motion for Summary Judgment.[1/] Based upon a review of the file, I recommend that the action be dismissed as to Advanced Sales Corporation and Tina Palazzo for lack of proper prosecution. I recommend further that summary judgment be granted in favor of Gulf Oil Corporation, and against Frank Palazzo.

I.

The plaintiff, Advanced Sales Cor-

E

poration ("Advanced"), is an independent, non-branded wholesale purchaser of gasoline. The plaintiffs, Frank Palazzo and Tina Palazzo, co-owned business property leased by Advanced and were officers of that corporation when this suit was filed.

In 1973, because of a shortage of gasoline, Congress enacted the Emergency Petroleum Allocation Act ("EPAA"), 15 USC 751, et seq., which regulated the sale of gasoline by refiners, such as Gulf Oil Corporation. On March 7, 1974, pursuant to the EPAA, the Federal Energy Administration ("FEA") designated the defendant as the supplier of gasoline to Advanced. In a five-count amended complaint, Advanced seeks damages for alleged overcharges under the EPAA, alleged violations of the Sherman and Clayton Acts, and alleged violations of

Florida's antitrust law. The individual plaintiffs also seek damages based upon alleged violations by Gulf of the EPAA and Florida's antitrust law.

II.

A. For more than a year and a half, Advanced Sales Corporation has not been represented by counsel. Despite warnings that its claims would be dismissed if it did not obtain legal counsel, Advanced has failed to retain an attorney. Since a corporation may only appear through counsel under the Local Rules, I recommend that Advanced's claims be dismissed.

On April 20, 1981, counsel for all three plaintiffs, Advanced Sales Corporation, Frank Palazzo and Tina Pallazzo, filed a Motion to Withdraw, stating in his memorandum that he had only agreed to represent the plaintiffs in

the preliminary stages of the suit. Counsel for the defendant, Gulf Oil Corporation, while not opposing withdrawal, noted that plaintiffs' counsel had advised defendant six months previously that plaintiffs were seeking new counsel. In view of the fact that the case had then been pending more than three years, defendant requested that plaintiffs be required to complete arrangements for legal representation expeditiously.

The district court granted plaintiffs' counsel's Motion to Withdraw on May 12, 1981, and ordered that within thirty days plaintiffs secure substitute counsel or, in the case of the individual plaintiffs, file an appropriate notice to proceed pro se. It was further ordered that the action would be dismissed without prejudice if the plaintiffs failed to comply within thirty days.

On June 12, 1981, plaintiff Frank Palazzo filed a Notice of Pro Se Appearance in which he requested to appear "pro se" for the plaintiffs, Advanced Sales Corporation and Tina Palazzo. This notice was patently insufficient to permit Frank Palazzo, who, it appears, is not an attorney and who, in any event, is not authorized to practice law in Florida, to represent Advanced and Tina Palazzo. Accordingly, on March 29, 1982, following a removal to, and remand from, the Bankruptcy Court, an Order was entered establishing a date for consideration of the defendant's Motion for Summary Judgment and specifically stating that the Court would not entertain any submissions on behalf of the corporate plaintiff, except those submitted by its attorney.

To date, plaintiff Advanced

Sales Corporation has not retained counsel. Under Local Rule 2.03(d), a corporation may appear and be heard only through counsel. Therefore, in accordance with the Order of the district court filed on May 12, 1981, I recommend that the claims of Advanced Sales Corporation be dismissed for its failure to comply with Local Rule 2.03(d).[2/]

B. Similarly, Tina Palazzo has failed to comply for more than one and one-half years with the Court's Order of May 12, 1981, directing that she retain counsel or file notice of her intention to proceed pro se. Moreover, although she was directed by the Order of May 29, 1982, to either join in a memorandum filed by Frank Palazzo or file her own response, she has failed to do so. The only conclusion that can be drawn is that Tina Palazzo has no inter-

est in this law suit.

Frank Palazzo asserts that by virtue of a divorce settlement he has succeeded to Tina Palazzo's interest in this action. Even if this is so, the fact still remains that Tina Palazzo has failed to prosecute whatever interest she may have retained following the settlement.

I, therefore, recommend that Tina Palazzo be dismissed as a party for failure to prosecute.[3/] See Local Rule 3.10(a).

Accordingly, I recommend that Counts I, II and III, containing the corporate claims, be dismissed; that Tina Palazzo's claim in Count IV be dismissed; and that the claims of Advanced and Tina Palazzo in Count V be dismissed.

III.

In Count IV, the plaintiff,

Frank Palazzo, who has filed sufficient notice of his intention to appear pro se, seeks damages for alleged violations by Gulf of the EPAA. Specifically, the plaintiff requests relief under Section 210 of the Economic Stabilization Act ("ESA"), 12 USC 1904, et seq., which was incorporated by reference in the EPAA. The defendant has moved for summary judgment as to this claim. That motion should be granted.

A. In order to be entitled to summary judgment, the moving party must show the absence of any genuine issue of material fact and the right to summary judgment as a matter of law. F.R.Civ.P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). "Summary judgment is proper only 'when the truth is clear, where the basic facts are undisputed and the parties are not in dis-

agreement regarding material factual inferences that may be properly drawn from such facts'." Crystal City v. Del Monte Corp., 463 F.2d 976, 981 (5th Cir. 1972), cert. denied, 409 U.S. 1023 (1972). All reasonable doubts about the facts should be resolved in favor of the non-moving litigant. Casey Enterprises v. American Hardware Mutual Insurance Co., 655 F.2d 598, 602 (5th Cir. 1981). On the other hand, when a movant makes a convincing showing that genuine issues of fact are lacking, the opposing party cannot simply rely upon the pleadings, but must present facts which show that a real, not formal, controversy exists. Mandalay Shores Co-op. Housing Association v. Pierce, 667 F.2d 1195 (5th Cir. 1982).

B. Although Section 210(b) plainly establishes a private cause of

action for overcharges of regulated goods or services, that section does not extend to the plaintiff's circumstances. Section 210(b) permits recovery for overcharges from "any person...selling goods...who is found to have overcharged the plaintiff." In light of this language, Section 210(b) has been held to authorize recovery only by a purchaser of a regulated commodity from his immediate seller. Arnson v. General Motors Corp., 377 F.Supp. 209 (N.D. Ohio 1974). In this case, the plaintiff does not allege that he purchased any gasoline directly from Gulf. Accordingly, the plaintiff cannot predicate a claim upon Section 210(b).

Frank Palazzo argues, however, that he is entitled to relief pursuant to Section 210(a) of the ESA. Section 210(a) provides that, a party who suffers

any "legal wrong" arising out of the EPAA may sue for damages in federal district court without regard to the amount in controversy. The plaintiff contends that he, as an individual, suffered a "legal wrong" because Gulf overcharged Advanced under the EPAA. He alleges that Advanced's loss of profits caused him, as a stockholder, officer and lessor, to suffer economic, physical and mental damages.

As I have previously discussed at some length, Section 210(a) does not authorize remote damage claims such as those asserted by Frank Palazzo. See Report and Recommendation, Zenith Industries Co. v. Florida Power Co., No. 78-695-CIV-T-H (March 10, 1981), pp. 4-11. In my view, Section 210(a) was simply intended to be a jurisdictional provision which authorized suit in feder-

al court, without regard to amount, for the violation of any right created by the ESA, or, by adoption, the EPAA. See Arnson v. General Motors Corp., supra; but see Newman Oil Co. v. Atlantic Richfield Co., 597 F.2d 275 (TECA 1979), cert. denied, 444 U.S. 842. In any event, there is nothing in the legislative history which suggests that Congress intended to permit indirect EPAA damage actions. See 92 Cong., 1st Sess. [1971] U.S. Code Cong. & Admin. News, 2283-2312. To the contrary, Senator Metcalf, in explaining Section 210, stated that it authorizes "relief only for particular persons aggrieved by the program, the person against whom the wage or price action is directed." 117 Cong.Rec. 43478 (1971). Accordingly, relief under Section 210(a) has been denied for remote damage claims like those presented by

Frank Palazzo. Zenith Industries Co. v. Florida Power Co., No. 78-695-CIV-T-H (M.D. Fla. 1981); Florida Power & Light Co. v. Belcher Oil Co., 82 F.R.D. 78 (S.D. Fla. 1979); Arnson v. General Motors Corp., supra.

C. Furthermore, even if under Section 210(a) Frank Palazzo were authorized to recover damages based upon overcharges made by Gulf to Advanced, Gulf would still be entitled to summary judgment because Palazzo has failed to make any factual showing that Gulf actually overcharged Advanced.

A refiner may not charge a class of purchaser more than the "maximum allowable price," 10 C.F.R. 212.83,[4/] which is defined as the weighted average price at which the product was lawfully priced in transactions with the class of purchaser on May 15, 1973, plus in-

creased product costs. 10 C.F.R. 212.82(6). A "class of purchaser" means "purchasers to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers." 10 C.F.R. 212.31.

Palazzo contends Gulf overcharged Advanced because Gulf billed Advanced based on the Dealer Tank Wagon ("DTW") price paid by the class of Gulf-branded retailers. The plaintiff argues that because Advanced is a non-branded retailer of gasoline, that is, a seller not using and benefiting from Gulf's name and services, Gulf was required to charge Advanced a price lower than that paid by branded retailers, to offset benefits enjoyed by branded retailers.

Gulf responds that it properly

categorized Advanced with all retailers, including branded retailers. Gulf contends that charging Advanced less than the DTW price would have meant creation of a new class of purchaser that did not exist on May 15, 1973, the base price date, in violation of the EPAA and applicable FEA Interpretation 1976-7, 42 Fed.Reg. 7931 (1977), states that the EPAA regulations do not provide for the creation of new classes of purchaser which did not exist on the base price date, unless a new customer constituted a "new market," as defined in 10 C.F.R. 212.111.[5/] Under the FEA Interpretation new customers purchasing a product previously sold by the seller must be placed in one of the classes of purchaser that existed on May 15, 1973. See Merry Twins Inc. v. Exxon Corp., 611 F.2d 874 (TECA 1979).

Gulf has filed affidavits showing that it placed Advanced in the proper class of purchaser. Rush Ulmer, Retail Marketer for Gulf in Hillsborough and Pinellas Counties, stated in his affidavit that Gulf had only one class of purchaser for all retailers of gasoline in Hillsborough and Pinellas Counties on the base price date. Mr. Ulmer further said that as of May 15, 1973, all retailers supplied by Gulf were supplied by the Port Tampa terminal and were charged the DTW price. One of Gulf's state-wide managers, and a retail marketer in Advanced's area on May 15, 1973, Nathan Griffin, also provided an affidavit, stating that Gulf categorized all retailers in one class and supplied all of them with gasoline from Port Tampa at the DTW price.

Gulf's evidence regarding

classification and treatment of all retailers as of the base price date is uncontroverted by Palazzo. Thus, Palazzo has not shown that Gulf was supplying non-branded retailers as a separate class of purchaser on May 15, 1973. Nor has he adduced any evidence indicating that there was a class other than that of "retailers" which was more appropriate for Advanced.

In opposing the motion for summary judgment, Palazzo simply complains that Gulf has prevented him from controverting defendant's allegations by failing adequately to answer interrogatories, particularly interrogatory seven. As indicated by separate Order, Gulf has reasonably answered the plaintiff's interrogatories. Even if Gulf had not fully answered plaintiff's interrogatories, however, the plaintiff has still

had sufficient opportunity in the more than four and one-half years since this suit was filed, to obtain information by other means. It is obvious from a review of the file that there has not been diligent prosecution of this case, and that includes, but is not limited to, the failure to conduct appropriate discovery. This case involves gasoline, not wine, and, thus, there is no reason to think that it will improve with age.

In sum, the plaintiff has failed to controvert Gulf's showing that, in accordance with its historical class of purchaser, it supplied all retailers from one location at one price. Accordingly, there is no basis for a conclusion that Gulf overcharged Advanced.

For the foregoing reasons,

I recommend that on Count IV summary judgment be granted for Gulf Oil Corporation, against the plaintiff, Frank Palazzo.

IV.

In Count V, the plaintiff Frank Palazzo seeks damages for defendant Gulf Oil Corporation's alleged violations of Fla.Stat. 542.01, et seq.

A. The defendant contends that it is entitled to summary judgment on this claim because the Florida antitrust act does not confer a private right of action and because Gulf did not, in any event, violate the antitrust laws by its conduct.[6/]

As explained in this Court's Order of March 18, 1981, the court in Hardrives Co. v. East Coast Asphalt Corp., 166 So.2d 810 (Fla. App. 1964) permitted a private defendant to assert an antitrust counterclaim based upon

the Florida antitrust act. The court clearly indicated that a civil action for damages arises by virtue of the Florida statute. See Point East One Condominium v. Point East Developers, 348 So.2d 32, 38 (Fla. App. 1977) (concurding and dissenting opinion).

B. Although the prior Florida antitrust act permits a private cause of action, it does not authorize recovery of the damages sought by Frank Palazzo.

The plaintiff seeks damages for injuries he alleges he sustained by virtue of antitrust violations directed against Advanced. The plaintiff alleges that Gulf and others combined, contracted or conspired to restrict the sale of gasoline in Florida, and to prevent competition in the transportation, sale and purchase of gasoline in Florida. Palazzo alleges further that as a result of Gulf's conduct

he suffered (1) the loss of ability to carry on the business of American Janitorial and Building Maintenance Service; (2) the loss of income from the inability to carry on the business of American Janitorial; (3) reduced pay from Advanced due to longer hours without increase in salary; and (4) reduction of actual salary by Advanced due to impaired ability of Advanced to pay.

The private damage suit under Florida's former antitrust statute, which was recognized by Hardrives, does not authorize such incidental injuries. Rather, Hardrives stated, in accordance with the general rule, that the Act allowed recovery of damages that were proximately caused by a defendant's alleged conduct. Id. at 812. Plainly, the damages alleged by Palazzo are so remote and incidental that they cannot

reasonably be said to have been proximately caused by Gulf's allegedly illegal actions. See Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1362 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (judgment n.o.v. affirmed where the only damages "proved 'resulted from the ripple effect caused by defendants' actions'"); Mendenhall v. Fleming Co., Inc., 504 F.2d 879 (5th Cir. 1974).

In Count V, therefore, Frank Palazzo has failed to state a compensable violation of the former Florida antitrust act.

C. Furthermore, Frank Palazzo has failed adequately to respond to Gulf's strong showing that it did not violate the Florida antitrust act. That law prohibited certain concerted action by a "combination of capital, skill or acts by two or more" parties.

Fla. Stat. §§542.01(1), 542.05(1)(1979). Gulf has filed affidavits of its officials stating that they did not discuss, agree, or conspire with any gasoline retailer, trade association, or FEA official concerning Advanced's allocation of gasoline or the price of gasoline to be paid to Gulf by Advanced. Gulf has also presented portions of Frank Palazzo's deposition which show that his allegations of concerted action are vague, speculative and unsupported. In response, Frank Palazzo has not presented anything that would raise a genuine issue of fact as to whether Gulf had engaged in the concerted activity alleged in the first amended complaint. As previously indicated, his assertion that he was not given an opportunity to obtain appropriate discovery is without foundation.

For these reasons, Gulf is entitled to summary judgment against Frank Palazzo on Count V.

V.

In accordance with the foregoing discussion, I recommend that the claims of Advanced and Tina Palazzo be dismissed. I further recommend that on Counts IV and V summary judgment be granted against Frank Palazzo and in favor of Gulf.

Respectfully submitted,

/S/
THOMAS G. WILSON
UNITED STATES MAGISTRATE

DATED: NOVEMBER 16, 1982

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its filing shall bar an aggrieved party from attack-

ing the factual findings on appeal.

28 USC 636(b)(1).

FOOTNOTES:

1/ The Motion for Summary Judgment was specifically referred to the undersigned for a report and recommendation.

2/ Frank Palazzo seeks in his Motion to Recognize Frank Palazzo As Plaintiff in All Counts and Proceed Pro Se to avoid the requirement that Advanced be represented by an attorney. However, it is well established that an individual may not assert the claims of a corporation. Stevens v. Lowder, 643 F.2d 1078 (5th Cir. 1981); Mendenhall v. Fleming Co., Inc., 504 F.2d 879 (5th Cir. 1974). Frank Palazzo's status as creditor, lessor, officer and stockholder of Advanced, therefore, does not permit him, as plaintiff, to prosecute Advanced's claims. Accordingly, an Order has been entered denying Frank Palazzo's motion.

3/ It is appropriate to note that even if Tina Palazzo's claims were not subject to dismissal for lack of prosecution, Gulf would be entitled to summary judgment on those claims for the same reasons summary judgment is warranted on Frank Palazzo's claims. See Section III, infra.

4/ The EPAA provides that the allocation of gasoline shall be governed by regulation. 15 USC 753.

5/ Regulation 212.11 provides, in pertinent part, that a product not sold at any time during the one-year period immediately preceding the first date on which the firm offers it for sale to a market is a "new item." "New items" sold to a market, defined as one or more, resellers, retailers, consumers, manufacturers or service organizations render the market a "new market."

Palazzo does not argue that Gulf's sales to Advanced constituted a new market. Any such argument would be without merit since Gulf has shown that it supplied gasoline to retailers on, and before, May 15, 1973.

6/ As the defendant acknowledges, Chapter 542 was amended, effective October 1, 1980, to provide for a right of private action. Contrary to the plaintiff's contention, however, his claim does not arise under the new statute since the alleged violations occurred before the effective date of the amendment, and the plaintiff cannot establish a continuing violation under Fla. Stat. 542.36.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ADVANCED SALES CORPORATION
d/b/a DAYTONA PIT STOP,
FRANK PALAZZO and TINA PALAZZO,

Plaintiffs,

vs. Case No. 78-219-Civ-T-WC

GULF OIL CORPORATION, etc.,

Defendant.

ORDER OF DISMISSAL

The Court has for consideration Defendant's Motion for Summary Judgment. The Court referred the motion to Magistrate Thomas G. Wilson, who issued his Report and Recommendation on November 16, 1982. Plaintiffs filed a Notice of Objection to the Magistrate's findings, to which Defendant has responded. The Court has reviewed the submissions of the parties and the Report and Recommendation of the Magistrate and has independently examined the file. The

F

The Court finds that the filings in this case show that there is no genuine issue as to any material fact with regard to the claim of Plaintiff, Frank Palazzo, against Defendant, Gulf Oil Corporation, a Pennsylvania corporation, and that Defendant Gulf Oil Corporation is entitled to judgment as a matter of law and in all respects, the Magistrate's Report and Recommendation is adopted and confirmed and made a part hereof. Accordingly, it is

ORDERED:

1. The claims of Advanced Sales Corporation in Counts I, II, III and V are dismissed for failure of the Plaintiff corporation to comply with Local Rule 2.03(d), Rules of the Middle District of Florida.

2. The claims of Tina Palazzo in Counts IV and V are dismissed for

failure to prosecute.

3. Summary Judgment on Counts IV and V will be entered in favor of Defendant, Gulf Oil Corporation, and against Plaintiff, Frank Palazzo.

DONE AND ORDERED at Tampa, Florida this 31st day of January, 1983.

/S/

WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

January 10, 1985

The Honorable Paul H. Roney
The Honorable Gerald Bard Tjoflat
The Honorable John R. Brown
United States Court of Appeals
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: Frank Palazzo v. Gulf Oil, Inc.
Case No. 83-3219

Your Honor:

Pursuant to the Court's invitation, I am pleased to submit this post-argument letter relative to the precedental effect vel non of National Independent Theatre Exhibitors, Inc. v. Charter Financial Group, No. 82-8669, 747 F.2d 1396 (11th Cir. 1984).

Without doubt, that opinion by Judge Tjoflat is appropriate under the facts of that case as they relate to Mr. Patterson's proximity to the "bull's eye" of the target aimed at by Columbia and Charter. To begin with the proposition that Mr. Palazzo was a remote by-stander

is only to compel the result. It is thus an invitation to purely inductive reasoning. It is an error as fundamental as it is elementary to categorize Mr. Palazzo as remote in this cause as Mr. Patterson was in the recently decided case. It is obvious that Mr. Palazzo and his corporation represent only the left and right pocket of the same entity. Thus, it is clear from the facts in the instant record that the theory of Mr. Patterson's remoteness which was pursuasive in National Independent Theatre (NITE) is not reasonably applicable to Mr. Palazzo.

The brutal assault by Gulf on Mr. Palazzo's business interests as alleged in his amended complaint is surely distinguishable from the rather benign behavior of the parties in NITE. Moreover, Charter being advised by the First

National Bank of Boston that NITE's proposed business venture was a risky investment creates a rule of reason case vis-a-vis the applicable per se standard if the allegations of Mr. Palazzo's complaint were allowed to proceed to plenary hearing.

Whether Mr. Palazzo was within the so-called target area of Gulf's anticompetitive conduct is a factual issue not susceptible of summary judgment disposition. The authoritative case law on this question compels a factual analysis of the method and effect of Gulf's conduct on Mr. Palazzo.

> There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a "material cause" of or a "substantial factor" in the occur-

rence of damage. (citations omitted). And this connection must also link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect. While any antitrust violation disrupts the competitive economy to some extent and creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders, or consumers, it has long been held that not all of these have the requisite standing to sue for treble damages and thereby take a leading role in the enforcement of the prohibition in question. (citations omitted). <u>These terms do not provide talismanic guides to decision, but they</u>

do indicate the need to examine the form of violation alleged and the nature of its effect on a plaintiff's own business activities.

See generally Pollock, Standing to Sue, Remoteness of Injury, and the Passing-on Defense, 32 A.B.A. Antitrust Actions §§ 4.02, 4.03 (1965). This policy has been expressed under the rubric of "standing" and implemented under a "target area" test. (citations omitted). There is absolutely no requirement that the loss be personal or unique to plaintiff, so long as the plaintiff has suffered loss in his business or property. Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977). (emphasis added).

. . . the plaintiff must demonstrate that he was within the area of the economy endangered by the competitive

breakdown. This approach was first proposed in Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952).

The use of the term "demonstrate" is a clear court expectation of proof and factual presentation. Such a concept is obviously inconsistent with summary judgment.

The "target area" test was more clearly articulated in Karseal Corp. v. Richfield Oil Corp., 221 F.2d 352 (9th Cir. 1955). Since the [defendant's] violation was aimed at impeding the sale of competitive products and was directed against the manufacturers and distributors of such products, the court concluded that the competing manufacturers, distributors and producers all were

the target of the illegal practices. See also: Calderone Enter.Corp. v. United Artists Theatre Circuit, 454 F.2d 1292 (2d Cir. 1971) at 1300.

The target area approach requires that a plaintiff suffer losses "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." In Re Multi-District Vehicle Air Pollution, 481 F.2d 122, 129 (9th Cir. 1973). Recovery under the Sherman Act must be preceded by an examination of the area of economy affected by the violation. Bray v. Safeway Stores, Inc., 392 F.Supp. 851 (N.D.Cal. 1975). (emphasis added). See also: GAF Corp. v. Circle Floor Co., Inc., 463 F.2d 752 (2d Cir. 1972) [... the court

should examine the form of the violation alleged and the effect on the plaintiff's business.] (at 758).

The holding of the United States Supreme Court in Perkins v. Standard Oil, 395 U.S. 642 (1969), clearly supports Palazzo's standing in the instant cause. Perkins owned and lent money to corporations which sold gasoline at both wholesale and retail levels. Perkins' retail service stations were harmed by Standard Oil's price discrimination and Perkins filed suit under the federal antitrust laws, claiming damages arising out of the corporate indebtedness to him and out of other "personal" claims. He alleged in part that he purchased gas from defendant Standard Oil, who charged him higher prices than it charged its own dealer, Signal. Signal sold to Western Highway, which in turn sold to Regal stations.

Regal, competed with Perkins, and could offer lower prices than Perkins' stations as a result of Standard Oil's prices discrimination that initially favored Signal.

The Ninth Circuit dismissed all claims on the issue of liability arising out of Standard Oil's favoring Signal, holding that plaintiff's injury was too remote for recovery. Certainly, Perkins was far more removed from Standard's anti-competitive activities than Mr. Palazzo was removed from the acts of Gulf in the instant cause.

Nonetheles[s], the Supreme Court granted certiorari and reversed the Ninth Circuit. On point with the issues involved in the instant cause, the Supreme Court held that the plaintiff was entitled to submit all of his damages to the jury in whatever capacity they were sustained.

Similar to Mr. Palazzo in this case, the Supreme Court commented that:

> It is clear in this case...that Perkins was victim of the price discrimination practiced by Standard. Since he was directly injured and was clearly entitled to bring this suit, he was entitled to present evidence of all of his losses to the jury. Id. at 649-650. (emphasis added).

The context within which this holding was rendered emphasizes its importance; The Supreme Court raised the issue of standing sua sponte, certiorari having been accepted only to consider the Ninth Circuit's interpretation of the Robinson-Patman Act. The Supreme Court held that Perkins had standing to complain of Standard Oil's price discrimination in favor of Signal. Perkins was the principal

victim, the apparent object and target of Standard's anticompetitive activities:

> We find no basis in the language or purpose of the act for immunizing Standard's price discrimination simply because the product in question passed through an additional formal exchange before reaching the level of Perkins' actual competitor. From Perkins' point of view, the competitive harm done him by Standard is certainly no less becuase of the ppresence of an additional link in the chain from the producer to the retailer. Id. at 649.

In view of the strong language of Perkins, it is most respectfully suggested the facts of record behind your Court's NITE opinion are not present with respect to Mr. Palazzo. At the very least, the existence or absence of Perkins-type facts

should be a factual issue ill-suited for determination by summary judgment. If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury. Perkins, Id. at 648.

Applying the inductive reasoning of NITE to Mr. Palazzo's case without the travail of the deductive analysis commanded by Perkins would be to stand the target theory on its semantic head and would, it is suggested, be a jurisprudential error.

I sincerely appreciate the Court's invitation to comment and respond to the Court's question of standing through this letter. Of course, adverse counsel has been sent a copy of this letter.

Most respectfully,

/S/

Herbert T. Schwartz

HTS/ss

Copy to: Keith Rounsaville, Esquire

Mr. Frank Palazzo

United States Court of Appeals
For the Eleventh Circuit

No: 83-3219
D.C. Docket No. 78-219

Frank Palazzo,

Plaintiff-Appellant,

versus

Gulf Oil Corporation,
A Pennsylvania Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of FL

Before RONEY and TJOFLAT, Circuit Judges, and BROWN*, Senior Circuit Judge

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be

and the same is hereby, AFFIRMED.

*Honorable John R. Brown,
U.S. Circuit Judge for the Fifth
Circuit, sitting by designation.

Entered: July 5, 1985
For the Court: Spencer D. Mercer, Clerk
BY: _____
Deputy Clerk

Reissued as Mandate: October 16, 1985